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# IN THE SUPREME COURT OF THE UNITED STATES

## OCTOBER TERM 1935

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**ED BROWN, HENRY SHIELDS, and YANK ELLINGTON, Petitioners,**

**VS.** **No. 301**

**THE STATE OF MISSISSIPPI.**

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## BRIEF OF RESPONDENT

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GREEK L. RICE, Attorney General

WILLIAM DOW CONN, JR., and

WILLIAM H. MAYNARD, Assistant Attorneys General.

Counsel for Respondent.

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IN THE

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**ED BROWN, HENRY SHIELDS, and YANK ELLINGTON, Petitioners,**

**VS.** **No. 301**

**THE STATE OF MISSISSIPPI.**

---

## BRIEF OF RESPONDENT

## HISTORY OF THE CASE

Ed Brown, Henry Shields and Yank Ellington were indicted at the March, 1934, Term of the Circuit Court of Kemper County, Mississippi, for the murder of Raymond Stuart, a human being. The indictment (R. 1) was filed with the Clerk of that Court on April 4th, 1934. They were arrested on the same day (R. 2) and brought into court. They were arraigned and entered pleas of "not guilty" (R. 2). They were tried jointly, the jury returning a verdict of "guilty as charged" as to each of them, such verdict making it mandatory upon the court to impose the death sentence (Sec. 1293, Mississippi Code of 1930). From the judgment entered on the verdict of the jury (R. 3, 4), the convicts appealed to the Supreme Court

of the State, Mississippi's highest court of appeals. This judgment was affirmed, five of the judges of the court concurring in the affirmance (R. 127 et seq.), with one dissenting. (R. 135 et seq.)

After the affirmance in the State Supreme Court, a Suggestion of Error was filed in that court by attorneys other than those who represented the petitioners in the trial court and in the Supreme Court on the original appeal (R. 138 et seq.).

Upon this Suggestion of Error, for the first time in the proceedings, Federal questions were asserted. This Suggestion of Error was overruled by the Court, four of the judges concurring therein (R. 166 et seq.) with two judges dissenting (R. 173 et seq.).

Thereupon, a petition for writ of certiorari was addressed to this Court, which was sustained, the order allowing it being filed on October 14, 1935.

## PRELIMINARY STATEMENT OF THE CASE

In the main, the petitioners rely upon two major propositions: (1) that the use of extorted confessions against them by the state amounted to a denial of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States; and (2) that they were denied, in reality, representation by counsel, and thus denied due process of law within the meaning of that Amendment. There are three other as-

signments of error upon which argument is made here, but they, in effect, depend entirely upon the two main propositions above referred to.

From the arguments made here by petitioners, it will be seen that a detailed summary of all the facts is unnecessary for a proper understanding of them. However, respondent submits that the facts have been accurately drawn and presented in the opinion of the Mississippi Supreme Court, appearing at page 128 et seq. of the record now before this Court.

Such facts as are necessary for a proper understanding of the various contentions will be set out in connection with the argument thereon.

## BRIEF OF THE ARGUMENT

### POINT I.

THAT: PETITIONERS WERE DENIED DUE PROCESS OF LAW BY THE FRAUD OF THE STATE, THROUGH ITS AGENTS.

It is said that the use of confessions coerced from appellants by the State in the prosecution of this case constituted a double fraud: (1) that it violated Section 26 of the Constitution of the State of Mississippi, which provides that

> "In all criminal prosecutions the accused * * * shall not be compelled to give evidence against himself";

and, (2) that it violated the Fourteenth Amendment to the Federal Constitution, and particularly that clause of it which provides:

> "Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The Mississippi Supreme Court held that no rights of appellants under the Constitution were infringed (R. 168). But, assuming, not conceding, that the confessions in this case were coerced, has this court the right, under the law, to review the action of the State courts in passing upon the admissibility of this evidence so far as it affects rights under the State's Constitution? This court has held that it has not that right, and has laid down the rule that when the highest court of a State has decided that proceedings in a State court have not infringed any rights of an accused guaranteed him by the State's Constitution, such decision cannot be reviewed by the United States Supreme Court.

*Brown vs. New Jersey*, 175 U. S. 172;

*Barrington vs. Missouri*, 205 U. S. 483;

*Spies vs. Illinois*, 123 U. S. 131 (181).

On the other hand, the State of Mississippi submits that there is nothing in the Federal Constitution which is infringed by the use in state courts of coerced confessions, even if we concede that the confessions in this case were

so coerced; or, stated in other words, the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution.

The Fifth and Fourteenth Amendments to the Federal Constitution are the ones dealing with the subject of "due process of law." The Fifth Amendment also provides that

> "no person * * * shall be compelled, in any criminal case, to be a witness against himself."

But it has been uniformly held by this court that the Fifth Amendment was not intended to limit the powers of the State Governments in respect to their own people, but to operate on the National Government alone. It regulates the procedure of the Federal Courts exclusively, and is not obligatory upon the several State of the Union.

*Barrington vs. Missouri*, 205 U. S. 483;

*Ensign v. Pennsylvania*, 227 U. S. 592;

*Barron vs. Baltimore*, 7 Pet. (32 U. S.) 243;

*Spies vs. Illinois*, 123 U. S. 131;

*Livingston vs. Moore*, 7 Pet. 469;

*Fox vs. Ohio*, 5 How. 410;

*Smith vs. Maryland*, 18 How. 71;

*Withers vs. Buckley*, 20 How. 84;

*Pervear vs. Commonwealth*, 5 Wall. 475;

*The Justices vs. Murray*, 9 Wall 274;

*Edwards vs. Elliot*, 21 Wall 532;

*Walker vs. Sauvinet*, 92 U. S. 90;

*United States vs. Cruicshank*, 92 U. S. 542;

*Pearson vs. Yewdall*, 95 U. S. 294;

*Davidson vs. New Orleans*, 96 U. S. 97;

*Kelly vs. Pittsburg*, 104 U. S. 78;

*Presser vs. Illinois*, 116 U. S. 252;

*Brown vs. New Jersey*, 175 U. S. 172;

The Fourteenth Amendment legitimately operates to extend to the citizens and residents of the States the same protection against arbitrary state legislation affecting life, liberty and property, as is offered by the Fifth Amendment against similar legislation by Congress. But the Federal Courts ought not to interfere when what is complained of amounts to the enforcement of the laws of a State applicable to all persons in like circumstances and conditions, and the Federal Courts should not interfere unless there is some abuse of law amounting to confiscation of property or deprivation of personal rights.

In *Twining vs. New Jersey*, 211 U. S. 78, this court observed:

> "The Fourteenth Amendment withdrew from the States powers theretofore enjoyed by them to an extent not yet fully ascertained, or rather, to speak more accurately, limited those powers and restrained their exercise. There is no doubt of the duty of this court to enforce the limitations

and restraints whenever they exist, and there has been no hesitation in the performance of the duty. *But whenever a new limitation or restriction is declared it is a matter of grave import, since, to that extent, it diminishes the authority of the State, so necessary to the perpetuity of our dual form of government, and changes its relation to its people and to the Union.*"

In this same case (*Twining vs. New Jersey, supra*), this court, in discussing the privilege against self-incrimination, said: (113)

"Much might be said in favor of the view that the privilege (against self-incrimination) was guaranteed against state impairment as a privilege and immunity of National citizenship, but, as has been shown, the decisions of this court have foreclosed that view. There seems to be no more reason whatever, for straining the meaning of due process of law to include this privilege within it, because, perhaps, we may think it of great value. The States had guarded the privilege to the satisfaction of their own people up to the adoption of the Fourteenth Amendment. No reason is perceived why they cannot continue to do so. The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self government weakened by forced construction of the Federal Constitution. * * * * *

"* * * The authorities upon the question are in conflict. We do not pass upon the conflict, because, for the reasons given, *we think that the exemption from compulsory self-incrimination in the courts of the States is not secured by any part of the Federal Constitution.*"

In *Snyder vs. Massachusetts,* 291 U. S. 97, the court said:

" * * * Consistently with that amendment (The Fourteenth), trial by jury may be abolished. Walker vs. Sauvinet, 92 U. S. 90; Maxwell vs. Dow, supra. (176 U. S. 581); N. Y. Central R. Co. vs. White, 243 U. S. 188, 208; Wagner Electric Co. vs Lyndon, 262 U. S. 226, 232. Indictments by a grand jury may give way to informations by a public officer. Hurtado vs. California, supra, (110 U. S. 516); Gaines vs. Washington, 277 U. S. 81, 86. *The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state.*

*Twining vs. New Jersey,* supra, (211 U. S. 78.)'

Since, from the foregoing dicisions of this court, it clearly appears that the Federal Constitution contains no guaranty against self-incrimination in the courts of a State, and that the privilege of exemption from compulsory self-incrimination may be entirely withdrawn by a State without infringing any provision of the Federal Constitution, it then remains to be seen whether, in the use of these confessions, these appellants have been subjected

to the orderly processes of the law in the trial of their case, or have been arbitrarily discriminated against.

How far, under the Fourteenth Amendment to the Federal Constitution, may a State go in setting up and regulating its own forms of procedure and practice?

In *Jordan vs. Massachusetts*, 225 U. S. 167, the Court quoted from its decision in the case of *Louisville & Nashville R. Co. vs. Schmidt*, 177 U. S. 230, 236, as follows: (176)

> " 'It is no longer open to contention that the due process clause of the Fourteenth Amendment to the Constitution of the United States does not control mere forms of procedure in State Courts or regulate practice therein. All its requirements are complied with, provided in the proceedings which are claimed not to have been due process of law the person condemned has had sufficient notice and adequate opportunity to defend. Iowa Central Railway vs. Iowa, 160 U. S. 389; Wilson vs. North Carolina, 169 U. S. 586.'
>
> "When the essential elements of a court having jurisdiction in which an opportunity for a hearing is afforded are present, the power of a state over its methods of procedure is substantially unrestricted by the due process clause of the Constitution.
>
> "Touching the power of the States over their procedure for the administration of their police

power, Mr. Justice Moody, in Twining vs. New Jersey, cited above, (175 U. S. 172), said:

> " 'The power of their people ought not to be fettered, their sense of responsibility lessened, and their capacity for sober and restrained self-government weakened by forced construction of the Federal Constitution. If the people of New Jersey are not content with the law as declared in repeated decisions of their courts, the remedy is in their own hands.' "

In *Allen vs. Georgia,* 166 U. S. 138, the facts in substance were that a convicted murderer, under death sentence, escaped pending an appeal to the State Supreme Court. The Supreme Court of Georgia, upon being advised that the convict was a fugitive, ordered his writ of error dismissed, unless he should surrender himself to custody or be re-captured within sixty day. At the expiration of the sixty days, the convict not having surrendered or been recaptured, his writ of error was finally dismissed. Subsequently, he was recaptured and obtained a writ of error to this court upon the alleged ground that the dismissal of his writ of error by the State Court under the circumstances was a denial of due process.

This court affirmed the action of the State Supreme Court and in the course of the opinion (140) said:

> "* * * * Without attempting to define exactly in what due process consists, it is sufficient to say that, if the Supreme Court of a

State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in very exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process. *We might ourselves have pursued a different course in this case, but that is not the test.* The plaintiff in error must have been deprived of one of those fundamental rights, the observance of which is indispensable to the liberty of the citizen, to justify our interference."

The foregoing quotation was set out and appoved in *Wilson vs. North Carolina*, 169 U. S. 586, 593.

In *Rogers vs. Peck*, 199 U. S. 425, the court said:

(434) "The reluctance with which this court will sanction Federal interference with a state in the administration of its domestic law for the prosecution of crime has been frequently stated in the deliverances of the court upon the subject. *It is only where fundamental rights, specially secured by the Federal Constitution, are invaded that such interference is warranted.* Ex Parte Reggel, 114 U. S. 642; In re Converse, 137 U. S. 624; Allen vs. Georgia, 166 U. S. 138; Hodgson vs. Vermont, 168 U. S. 262; Brown vs. New Jersey, 175 U. S. 172; In re Frederich, 149 U. S. 70:" * * * * *

Due process of law, guaranteed by the Fourteenth Amendment, does not require the State to

adopt a particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Louisville & Mashville Railroad Co. vs. Schmidt, 177 U. S. 230; Wilson vs. North Carolina, 169 U. S. 586."

In *Frank vs. Mangum*, 237 U. S. 309 (326), the court observed:

"As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, *and conducted according to the settled course of judicial proceedings as established by the law of the state*, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the Constitutional sense. Walker vs. Sauvinet, 92 U. S. 90, 93; Hurtado vs. California, 110 U. S. 516, 535; Andrews vs. Schwartz, 156 U. S. 272, 276; Bergemann vs. Backer, 157 U. S. 655, 659; Rogers vs. Peck, 199 U. S. 425, 434; Drury vs. Lewis, 200 U. S. 1, 7; Felts vs. Murphy, 201 U. S. 123, 129; Howard vs. Kentucky, 200 U. S. 164."

In this case (*Frank vs. Mangum*) the court held that the practice in Georgia whereby a defendant might waive his right to be present at the reception of the jury's ver-

dict "is a regulation of criminal procedure that is within the authority of the state to adopt."

And, in *Garland vs. Washington*, 232 U. S. 642, 645, the court said:

> "Due process of law, this court has held, does not require the state to adopt any particular form of procedure, so long as it appears that the accused has had sufficient notice of the accusation and an adequate opportunity to defend himself in the prosecution. Rogers vs. Peck, 199 U. S. 425, 435."

Again, in *Ong Chang Wing vs. United States*, 218 U. S. 272, the court said:

> (279) "This court has had frequent occasion to consider the requirements of due process of law as applied to criminal procedure, and, generally speaking, it may be said that if an accused has been heard in a court of competent jurisdiction, and proceeded against under the orderly processes of the law, and only punished after inquiry and investigation, upon notice to him, with an opportunity to be heard, and a judgment awarded within the authority of a constitutional law, then he has due process of law. Rogers vs. Peck, 199 U. S. 425, 435; Twining vs. New Jersey, 211 U. S. 78, and the cases therein cited."

In *Snyder vs. Massachusetts*, 291 U. S. 97, 105, this court said:

"The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. Twining vs. New Jersey, 211 U. S. 78, 106, 111, 112; Rogers vs. Peck, 199 U. S. 425, 434; Maxwell vs. Dow, 176 U. S. 581, 604; Hurtado vs. California, 110 U. S. 516; Frank vs. Mangum, 237 U. S. 309, 326; Powell vs. Alabama, 287 U. S. 45, 67. Its procedure does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at bar. Consistently with that amendment, trial by jury may be abolished. Walker vs. Sauvinet, 92 U. S. 90; Maxwell vs. Dow, supra; N. Y. Central T. Co. vs. White, 243 U. S. 188, 208; Wagner Electric Co. vs. Lyndon, 262 U. S. 226, 232; Indictments by a grand jury may give way to informations by a public officer. Hurtado vs. California, supra; Gaines vs. Washington, 277 U. S. 81, 86. The privilege against self-incrimination may be withdrawn and the accused put upon the stand as a witness for the state. Twining vs. New Jersey, supra. What may not be taken away is notice of the charge and an adequate opportunity to be heard in defense of it. Twining vs. New Jersey, supra; Powell vs. Alabama, supra, pp. 68, 71; Holmes

vs. Conway, 241 U. S. 624. Cf. Blackmer vs. United States, 284 U. S. 421, 440."

The last paragraph of this decision (122) reads as follows:

"The Constitution and statutes and judicial decisions of the Commonwealth of Massachusetts are the authentic forms through which the sense of justice of the people of that Commonwealth expresses itself in law. We are not to supersede them on the ground that they deny the essentials of a trial because opinions may differ as to their policy or fairness. Not all the precepts of conduct precious to the hearts of many of us are immutable principles of justice, acknowledged *semper ubique et ab omnibus* (Otis vs. Parker, 187 U. S. 606, 609), wherever the good life is a subject of concern. There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

In *Maxwell vs. Dow*, 176 U. S., 581, 595, it is said:

"The states, so far as this amendment (The Fourteenth) is concerned, are left to regulate trials in their own courts in their own way."

In the concluding paragraph of this opinion, the court, in discussing the rule just quoted, said:

> "Under this construction of the amendment, there can be no just fear that the liberties of the citizen will not be carefully protected by the states, respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal Government *that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials*, whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. *These are matters which have no relation to the character of the Federal Government.* As was stated by Justice Brewer, in delivering the opinion of the court in Brown vs. New Jersey, 175 U. S. 172, the State has full control over the procedure of its courts, both in civil and criminal cases, *subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution.*"

And, as stated in the case of *Chicago, R. I. & P. R. Co. vs. Cole*, 251 U. S. 54, 56, this court has sustained all state

laws statutory or judicially declared, regulating procedure, evidence and methods of trial, including denial of jury trial in both civil and criminal cases.

Consistent, then, with the foregoing decisions of this court, the State of Mississippi has adopted certain rules regulating the admission of evidence in the trial of cases in its courts, and certain of these rules, particularly with reference to the trial of criminal cases, so far as they relate to the situation presented here, will be now referred to.

The Mississippi Supreme Court, as provided by Section 146 of that State's Constitution, is one of review only. It is not a court of original jurisdiction. That Section of its constitution provides:

> "The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals."

That court acts only on the record as made in the trial court and will not go outside of the record made at the trial in reviewing a judgment.

*City of Pascagoula vs. Delmas,* 157 Miss. 619, 128 So. 743;

*Akroyd vs. State,* 107 Miss. 51, 64 So. 936;

*Bufkin vs. State,* 134 Miss. 116, 98 So. 455;

*Lee vs. State,* 160 Miss, 618, 134 So. 185;

*Fairley vs. State,* 152 Miss. 656, 120 So. 747;

*Whit vs. State,* 85 Miss. 208, 37 So. 809;

Error in the admissibility of evidence can be predicated only on an objection thereto specifically pointed out the infirmity therein.

*Jackson vs. State*, 163 Miss. 235, 140 So. 683;

*Howard vs. Town of Newton*, 108 Miss. 548, 67 So. 49;

*Boatwright vs. State*, 143 Miss. 676, 109 So. 710;

Error in the admission of evidence cannot be assigned and a review had in the absence of objections in the court below. In other words, the Mississippi Supreme Court will not hold a trial court in error, unless the trial court has been called upon, by objection to evidence, to rule, and has ruled erroneously.

*Boutwell vs. State*, 165 Miss. 16, 143 So. 479;

*Grady vs. State*, 144 Miss. 778, 110 So. 225;

*Salmon vs. State*, 151 Miss. 539, 118 So. 610;

*Dugan vs. State*, 151 Miss. 781, 119 So. 298;

*Taylor vs. State*, 148 Miss. 621, 114 So. 390.

Not only must the objection to evidence be specific, pointing out the alleged infirmity in it, but the objector is held to the same ground of his objection as in the trial court. He cannot assign a new ground of objection on review. This is in accord with the rule that the parties to the litigation are confined in the Supreme Court to the precise questions raised and litigated in the trial court, since the Supreme Court is one of appellate jurisdiction only.

*Peters vs. State,* 158 Miss. 530; 130 So. 695.

*Marley vs. State,* 109 Miss. 717, 69 So. 210;

*Conwill vs. State,* 147 Miss. 118, 112 So. 868;

*Duckworth vs. Town of Taylorsville,* 142 Miss. 440, 107 So. 668;

*Boutwell vs. State,* 165 Miss. 16, 143 So. 479.

With reference to the admission of confessions into evidence, the law of Mississippi is that an involuntary confession, if properly objected to, is inadmissible. But if no objection is registered to an incompetent confession, there is nothing of which an accused can complain. This is in strict accord with the general rules laid down above.

The competency of a confession is a matter for the trial court to pass upon, and the trial court passes upon it as and when it is offered in evidence, provided an objection is made.

*Simmons vs. State,* 61 Miss. 243;

*Ellis vs. State,* 65 Miss. 44, 3 So. 188;

*Lipscomb vs. State,* 75 Miss. 559, 23 So. 210;

*Durham vs. State,* 158 Miss. 833, 131 So. 422;

*Tyler vs. State,* 159 Miss. 223, 131 So. 417;

*Whittaker vs. State,* 169 Miss. 517, 142 So. 474;

*Smith vs. State,* 165 Miss. 462, 144 So. 233.

And, when a confession is offered in evidence, the party against whom it is sought to be used may, if he so

requests, have the court determine its competency *vel non* in the absence of the jury.

*Ellis vs. State,* 65 Miss. 44, 3 So. 188;

*Lee vs. State,* 137 Miss. 329, 102 So. 296;

*Randolph vs. State,* 152 Miss. 48, 118 So. 354;

*Fletcher vs. State,* 159 Miss. 41, 131 So. 251;

*Jackson vs. State,* 163 Miss. 235, 140 So. 683;

When a preliminary inquiry into the admissibility of a confession is requested and allowed by the trial court, it is the duty of the accused, at that time, to show, if he can, the involuntary character of such alleged confession.

*Perkins vs. State,* 160 Miss. 720, 135 So. 357;

*Weatherford vs. State,* 164 Miss. 888, 143 So. 853;

*Lee vs. State,* 137 Miss. 329, 102 So. 296;

*Ellis vs. State,* 65 Miss. 44, 3 So. 188;

If, when the state offers a confession in evidence, the accused requests and obtains a preliminary inquiry into its admissibility in the absence of the jury and at such preliminary inquiry allows the state to prove the voluntary character of same, without showing, or offering to show, that such confession was involuntary, the trial court will not be held to have erred in allowing the confession to be related to the jury. And if, during the subsequent phases of the case, no motion is made to exclude such confession after there might be sufficient evidence to make the vol-

untary character of it questionable, and no ruling called for which would require the trial judge to again pass upon the competency of such evidence, under the rules set out supra, there is nothing of which he can complain in the court of review.

*Loftin vs. State,* 150 Miss. 228, 116 So. 435.

This latter case (*Loftin vs. State*) is squarely in point with the case at bar, and is direct authority for the decision in the case at bar.

In the case at bar, as pointed out by the Mississippi Supreme Court in its decision, the showing upon the preliminary inquiry into the competency of the confessions satisfied that they were voluntary. There was nothing shown to the contrary by the prisoners or anyone else at this preliminary inquiry—which is required under the rules laid down above. Afterwards, when the prisoners were testifying on the merits of the case, they testified in such a way as to throw doubt upon the competency of their confessions, as related by state witnesses. But they never, from that time on, called upon the court by motion, or any other procedural step which required it to again rule upon the competency of this evidence in the light of the subsequent testimony. The Mississippi Supreme Court, in reviewing this trial, and in affirming the decision of the trial court, merely followed old, well established rules of practice and procedure, as set out above, and particularly the case of *Loftin vs. State, supra.*

After a confession has been held competent by the trial judge and it is allowed to go to the jury, the jury is

then entitled to have detailed to it the circumstances under which the confession was made. This is the rule in Mississippi, because there the jury is the sole judge of the credibility of witnesses and the weight to be given their testimony, and without proof of such circumstances the jury would be at a loss as to the weight to be given it.

*Ellis vs. State,* 65 Miss. 44, 3 So. 188;

*Williams vs. State,* 72 Miss. 117, 16 So. 296;

*Brown vs. State,* 142 Miss. 335, 107 So. 373;

*Nichols vs. State,* 165 Miss. 114, 145 So. 903.

This was the theory of the defendants in this case. When the preliminary inquiry showed the confessions to be voluntary, as pointed out above, they did not show, or offer to show, anything that would indicate them to be otherwise. Later, while testifying on the merits of the case, they testified as to the reasons they had for making the confessions, and instead of calling upon the court to rule upon their competency, they elected to make it an out and out jury question, and procured instructions (No. 2, page 122 of record; and No. 8, page 124 of the record) which told the jury that if it believed their confessions were the result of coercion, force, threats, or intimidation, it should not consider such confessions as evidence against them.

The petitioners have not brought their case within the realm of review of the Mississippi court under these old, well-settled and established rules, and they can com-

plain now only of their own failure to proceed along the orderly lines of procedure marked out by the courts of this state. As pointed out in the decision of the Mississippi Supreme Court in its decision of this case (Record, 172):

> "The rules of procedure here applied are technical only in the sense that all such rules are, and what the appellants request is simply that they be excepted from the procedure heretofore uniformly applied to all litigants. This we cannot do. All litigants, of every race and color, are equal at the bar of this court, and we would feel deeply humiliated if the contrary could be justly said."

The case, both in the trial court and in the State Supreme Court, has been tried according to the rules and regulations that are applied in all cases of its like, and when this has been done, there is nothing of which the prisoners may complain in this court.

As said by this court in the opinion in the case of *In re Converse*, 137 U. S. 624, 631:

> "* * * Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of administration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void.

> "We repeat, as has been so often said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudications of the courts of a State in administering the process provided by the law of a State."

This last paragraph was also quoted with approval in the case of *Hodgson vs. Vermont*, 168 U. S. 262, 273.

Let us go further, however and suppose that the petitioners had moved to exclude the confessions after their testimony had gone in, and the court had overruled that motion. Let us suppose this was error, and let us likewise suppose that the Supreme Court of Mississippi had affirmed the conviction. What would their rights be then to have this court review their conviction?

In *Jones vs. Buffalo Creek Coal Co.*, 245 U. S. 328, this court said:

> "It is conceivable that the defendants below were right in whole or in part, and that the trial judge erred in admitting some or all of the evidence objected to and in rendering judgment for

the plaintiff. But error of a trial judge in admitting evidence or entering judgment after full hearing does not constitute a denial of due process of law. Central Land Co. vs. Laidley, 159 U. S. 103, 112."

And in *Bonner vs. Gorman,* 213 U. S. 103, it was said:

"It is firmly established that when parties have been fully heard in the regular course of judicial proceedings an erroneous decision of the state court does not deprive the unsuccessful party of his property without due process of law within the Fourteenth Amendment of the Constitution of the United States."—citing Central Land Co. vs. Laidley, 159 U. S. 103, 112.

And, again, in *American Railway Express Co. vs. Kentucky,* 273 U. S. 269, 273, this court held:

"It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. Arrowsmith vs. Harmoning, 181 U. S. 194, 195; Iowa Central Ry. Co. vs. Iowa, 160 U. S. 389, 393; Tracy vs. Ginzberg, 205 U. S. 170, 177; Bonner vs. Gorman, 213 U. S. 86, 91; McDonald vs. Oregon R. R. & Nav. Co., 233 U. S. 665, 669."

In the case of *Barrington vs. Missouri,* 205 U. S. 483, the appellant had been tried and convicted of murder. On

appeal to the State Supreme Court, the judgment was affirmed. A motion for rehearing, asserting Federal questions, was filed and denied without opinion. There was a motion to transfer to the court *en banc* which was sustained and the judgment was again affirmed. Federal questions were set up in this later motion, but the court delivered no opinion thereon. The case was then carried by writ of error to this court. One of the contentions was that alleged extra-judicial admissions had been extorted from him while under arrest and that the use of these admissions in evidence denied him his rights under the Federal constitution, the privilege against self-incrimination. As to the introduction of these admissions of the accused, the court said:

> "When the state offered in evidence the statements made by the defendant following his arrest, the trial court excluded the jury and heard the testimony of persons present at the time for the purpose of determining the competency thereof. After the examination of a number of witnesses, who detailed fully the circumstances under which the statments were made, counsel objected 'because there is no foundation laid for it and because it was (not) voluntary. This objection was overruled and the evidence admitted."

And, in discussing the asserted Federal question, raised for the first time on the motion for rehearing, the court said:

> "The suggestion came too late, and, moreover, Article V of the Amendments, alone relied

on, does not operate as a 'restriction of the powers of a state, but was intended to operate solely upon the Federal Government.' Brown vs. New Jersey, 175 U. S. 172. *And, if, as decided, the admission of this testimony did not violate the rights of the plaintiff in error under the Constitution and Laws of the State of Missouri, the record affords no basis for holding that he was not awarded due process of law.* Howard vs. Fleming, 191 U. S. 126."

The case of *Ensign vs. Pennsylvania*, 227 U. S. 592, involved a prosecution of certain bankers for the statutory crime of receiving deposits in an insolvent bank. At the trial certain schedules filed by them in a bankruptcy proceeding, as well as oral testimony of an expert accountant based upon an examination of their books, was admitted as evidence. The defendants' contentions that such testimony infringed their rights under the Federal Constitution were successively overruled by the state's appellate courts, and an appeal to this court followed. Said the court:

"Article V of Amendments to the Federal Constitution is invoked, which provides (*inter alia*)—'No person * * * shall be compelled in any criminal case to be a witness against himself.' But, as has been often reiterated, this Amendment is not obligatory upon the governments of the several states or their judicial establishments, and regulates the procedures of the Federal Courts only. (—citing cases—)

> "We are referred to a similar prohibition in Art. I, par. 9, of the Constitution of Pennsylvania; *but, even if the trial of the plaintiffs in error proceeded in disregard of this provision, no Federal right was thereby infringed.*"

In the case of *Howard vs. Kentucky*, 200 U. S. 164, this court quoted with approval a part of the opinion in *In re Converse*, 137 U. S. 624, 631, as follows (173):

> "State cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction."

Summing up, then, under this phase of the case, the State of Mississippi submits:

> FIRST: There is no Federal constitutional guaranty against compulsory self-incrimination. And since there is no such guaranty under the Federal Constitution, a denial of that right by a state court would infringe no right of an accused under that document, and this court has no jurisdiction to review this judgment upon the asserted ground that the use of extorted confessions amounted to a denial of due process of law;
>
> SECOND: The Mississippi Supreme Court has held, by its decision that the proceedings at the trial of this case in the Circuit Court of Kemper County, Mississippi, infringed no right of the

prisoners under the Mississippi Constitution, and its decision in this respect cannot be reviewed by this Court;

THIRD: The State of Mississippi is free to formulate and regulate its own forms or methods of procedure and practice; it has done so; the petitioners have been tried according to well-settled and established rules and regulations governing trials of criminal cases; there has been no arbitrary action which denies to them any fundamental rights or which conflicts with a single specific provision of the Federal Constitution; and, consequently, "due process of law," as that clause is used in the Fourteenth Amendment, has been accorded them;

FOURTH: If we assume that the trial court erred in its ruling admitting these confessions, such error would not have constituted a denial of due process of law under the Fourteenth Amendment to the Federal Constitution; and,

FIFTH: The State of Mississippi cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even though erroneous, of its highest court, while acting within its jurisdiction.

## POINT II.

THAT: PETITIONERS WERE DENIED DUE PROCESS OF LAW THROUGH DENIAL OF COUNSEL.

The record (5) recites that Hon. John A. Clark, DeKalb, Mississippi; Hon. Joe H. Daws, DeKalb, Mississippi; Hon. D. P. Davis, DeKalb, Mississippi; and Hon. L. P. Spinks, DeKalb, Mississippi, appeared for the defendants.

On page 2 of the record now before the court appears the arraignment of the prisoners, which shows that at the time of arraignment they were "represented by legal counsel."

In the cross-examination of Yank Ellington, one of the prisoners, at page 76 of the record, appears the following:

Q. Now, you plead guilty here yesterday?

A. Yes, sir.

Q. You were not any different yesterday from what you are now?

A. Yes, sir.

Q. You had two lawyers appointed for you?

A. Yes, sir.

Q. You came up here this morning and had two more?

A. Yes sir.

In the cross-examination of Ed Brown, another of the prisoners, at page 50 of the record, appears as follows:

Q. The court appointed lawyers for you yesterday afternoon?

A. Yes, sir, but I told him I didn't need none.

Q. You told the Court you didn't think they would do any good?

A. I told him I didn't think they would do no good because the man whipped us and told us we better stand on what we said.

Q. You talked to your lawyers yesterday afternoon?

A. In that room there, yes, sir.

Q. You talked to them again this morning?

A. Yes, sir.

And again at page 54 of the cross-examination of this same prisoner:

Q. The court gave you two lawyers yesterday?

A. Yes, sir.

Q. And two more this morning?

A. Yes, sir.

Q. That makes four?

A. Yes, sir.

Outside of what incidentally appears from the excerpts set out above, the record is silent as to whether counsel who appeared for the prisoners at arraignment and at the trial were employed by them or appointed by the court. It is true that there are some additional mat-

ters set up in what is captioned a "Motion in Arrest of Judgment and for a New Trial," but for reasons hereinafter set out, the State of Mississippi says that this court cannot refer to or be governed by these matters in the decision of this case.

In the opinion of the Mississippi Supreme Court in response to a Suggestion of Error (the equivalent of a Motion for Rehearing) the court said: (R. 172)

> "Much is said in the brief of counsel for the appellants in support of the suggestion of error to the effect that these appellants are negroes and 'stood before the trial court as helpless to defend themselves as sheep in a slaughter pen.' In justice to the court below, *we must say that this charge is not even remotely supported by the record.* It is based probably on things stated in ex parte affidavits in support of the motion in arrest of judgment which have no place in this discussion.
>
> "Again they say that the court below failed 'to provide counsel, in reality to defend' the appellants, and 'surely it is cruel folly for the State to contend, in a court of justice, that these negroes are to be bound by the strictest and most technical rules of practice and pleading—and this after their right to counsel has been effectively denied.' *No request was made of the court to continue the case, to pass it to a later day, or to*

*grant the appellants any further time for the preparation of their case.*

"The attorneys who defended the appellants in the court below are able lawyers of extensive practice—veterans of many forensic conflicts; and the record does not disclose that they consciously failed to discharge any duty they owed the appellants."

From the part of the court's opinion, quoted above, it will be seen that the court based its decision squarely upon the ground that since the question was not raised in the court below, there was nothing for it to review—in accordance with the rules and regulations referred to in connection with argument on Point 1, supra.

In the leading case of *Spies vs. Illinois,* 123 U. S. 131, 181, this court said:

"* * * To give us jurisdiction under Sec. 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here the decision must be against the right *so set up or claimed.* (Italics by the court.) *As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that*

*the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more.* This is not, as seems to be supposed by one of counsel for the petitioners, a question of waiver of a right under the Constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned."

The foregoing quotation from the case of *Spies vs. Illinois,* 123 U. S. 131, is quoted with approval by the court in *Jacobi vs. Alabama,* 187 U. S. 133, 136. As sustaining the same proposition, the court cites the cases of *Brooks vs. Missouri,* 124 U. S. 394, and *Baldwin vs. Kansas,* 129 U. S. 52.

In the case of *Baldwin vs. Kansas, supra,* the contention was that the jurors were not sworn according to the form of the oath prescribed by the state statute; that therefore it was not a legal jury; and that the judgment of the court on the verdict of such jury deprived accused of his life without due process of law. In discussing this "Federal" question, the court said:

"* * * In the present case, the record does not show that, at the trial before the jury, any title, right, privilege or immunity was specially set up or claimed. No objection was taken to the form of the oath at the trial, nor at the making of

> the motion for a new trial before the trial court, nor at the making of the motion for arrest of judgment in that court. The point was first suggested in the Supreme Court of the State. *That court, it appears, refused to consider the objection, on the ground that it was not taken at the trial.... For that reason, we, also cannot consider it.*"—citing Spies vs. Illinois, 123 U. S. 131, 181.

As supporting the rule that when and where the highest court of a state declines to pass upon a question upon the ground that it was not presented in the lower court, this court will not review such ruling, see the following additional cases:

*Miller vs. Texas,* 153 U. S. 535;

*Barrington vs. Missouri,* 205 U. S. 483;

*Corrigan vs. Buckley,* 271 U. S. 323;

*Brooks vs. Missouri,* 124 U. S. 394;

*Brown vs. Massachusetts,* 144 U. S. 573;

*Caldwell vs. Texas,* 137 U. S. 692;

*McNulty vs. California,* 149 U. S. 645.

Under the foregoing decisions of this court, the State of Mississippi submits that since question here under consideration was not raised in the trial court, and the State Supreme Court, the highest court of review in the State, has refused to consider it because of such fact, this court must likewise refuse to review this matter.

The prisoners rely exclusively upon the recent case of *Powell vs. Alabama,* 287 U. S. 45.

Hereinbefore, we have pointed out to the court everything there is in the record properly before the court. Let us see, then, whether, on those instances, there is sufficient to entitle the prisoners to a review of this matter, under what is said in the Powell case, commonly known as the "Scottsboro Case."

Picking up statements of the court in the opinion of the court in that case:

> (49) "But no counsel had been employed, and aside from a statement made by the trial judge several days later during a colloquy immediately preceding the trial, the record does not disclose when, or under what circumstances, an appointment of counsel was made, or who was appointed."

There were three grounds upon which the judgments were assailed, among them, No. 2, the one upon which the court reversed them. The court observed:

> (50) *"These questions were properly raised and saved in the courts below."*

> (53) "It is hardly necessary to say that, the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice. Not only was that not

done here, but such designation of counsel as was attempted was either so indefinite or so close upon the trial as to amount to a denial of effective and substantial aid in that regard. This (said the court) will be amply demonstrated by a brief review of the record."

The court then quotes the trial court as having said:

(53) "The court: I appointed all the members of the bar for the purpose of arraigning the defendants and then of course I anticipated them to continue to help them if no counsel appears."

The foregoing arrangement was the only one which had been made at the time the case was called for trial, and the state had announced ready for trial.

(56) "Whether they (attorneys appointed for the purpose of arraignment) would represent the defendants thereafter if no counsel appeared in their behalf, was a matter of speculation only, or, as the judge indicated, of mere anticipation on the part of the court."

When Mr. Roddy, an out-of-state lawyer, unfamiliar with the procedure of the Alabama Courts, made his appearance and stated that he wanted to assist whoever the court appointed, it seems that the trial court let it be understood that if he appeared for them, he would make no appointment. Finally, Mr. Moody, a local lawyer, volunteered to assist Mr. Roddy, and, said the court:

(57) "With this *dubious* understanding, the trials immediately proceeded."

(71) "*All that is necessary now to decide, as we do decide* (italics mine) is that in a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."

As will be noted above, this court was careful to state that "These questions were properly raised and saved in the courts below." That certainly cannot be said with reference to the case at bar. No "federal question" was ever hinted or raised until after the Supreme Court had decided the case on its merits, and this on a "Suggestion of Error." In its decision, the court did not decide what would have been the result if the matter had been properly raised in the trial court, but denied it upon the sole ground that it was not raised below, and consequently was not subject to review by it. And since it has done so on this one ground, this court cannot now review it.

This court has held that if the state court entertains a motion for rehearing (Suggestion of Error) in which

a Federal question, for the first time in the proceedings, is raised, and proceeds to pass upon the Federal question thus raised, it has been held that the question of Federal right has been raised in time to sustain the appellate jurisdiction of the Federal Court to review the judgment of the state court, although the general rule is that it is too late on a motion for rehearing to inject a Federal question into a case. The view is sustained by the following cases:

*McKay vs. Kalyton*, 204 U. S. 458;

*Sullivan vs. Texas*, 207 U. S. 416;

*Disconto Gesellschaft vs. Umbrecht*, 208 U. S. 570;

*Illinois Central R. Co. vs. Kentucky*, 218 U. S. 551.;

*Kentucky Union Co. vs. Kentucky*, 219 U. S. 140;

*Grannis vs. Ordean*, 234 U. S. 385.

But in this case, the Mississippi Court has not passed upon the Federal question thus raised on the Suggestion of Error, but has declined to consider it because not raised in the trial court, and consequently the general rule must prevail—namely, that the "Federal" question comes too late when first presented on a motion for rehearing, and the state court does not consider it as such.

And in this connection, what was said by this court in *Bonner vs. Gorman* 213 U. S. 86, 91, is important:

> "* * * Where a Federal question is raised on a second appeal and the state court refuses to

consider it, it comes too late. Union Mutual Life Insurance Company vs. Kirchoff, 169 U. S. 103, 110. And see Sayward vs. Denny, 158 U. S. 180; Mut. L. Ins. Co. vs. McGrew, 188 U. S. 291, 308. Moreover, 'according to the well-settled doctrine of this court with regard to cases coming from state courts, *unless a decision upon a Federal question was necessary to the judgment or in fact was made the ground of it, the writ of error must be dismissed.*' Arkansas Southern Railroad Company vs. German National Bank, 207 U. S. 270; California Powder Works vs. Davis, 151 U. S. 389; St. L. I. M. & S. Ry. Co. vs Taylor, 210 U. S. 281."

Also, what was said in *Corrigan vs. Buckley*, 271 U. S. 323, 329, seems to be important in this connection:

"The mere assertion that the case is one involving the construction or application of the Constitution, and in which the construction of federal laws is drawn in question, does not, however, authorize this court to entertain the appeal, and it is our duty to decline jurisdiction if the record does not present such a constitutional or statutory question substantial in character and properly raised below. Sugarman vs. United States, 249 U. S. 182, 184; Zucht vs. King, 260 U. S. 174, 176. And under well settled rules, jurisdiction is wanting if such questions are so unsubstantial as to be plainly without color of

merit and frivolous. Wilson vs. North Carolina, 169 U. S. 586, 595; Delmar Jockey Club vs. Missouri, 210 U. S. 324, 335; Binderup vs. Pathe Exchange, 263 U. S. 291, 305; Moore vs. New York Cotton Exchange, 270 U. S. 593."

And, in *Sugarman vs. United States*, 249 U. S. 182, cited in the Corrigan case, supra:

> "But mere reference to a provision of the Federal Constitution, or the mere assertion of a claim under it, does not authorize this court to review a criminal proceeding; and it is our duty to decline jurisdiction unless the writ of error presents a constitutional question, substantial in character, and properly raised below."—citing some six cases to sustain the ruling.

But aside from all this, counsel who represented these petitioners at the trial made numerous and specific objections throughout the trial, as reflected by the record. The only defense these petitioners could have possibly had was an alibi—and this defense was put forward with completeness by them and by those who might be in a position to know their movements at the time of night this homicide was committed. They made the character of the confessions a jury question, under instructions which they procured the court to give. It is well enough here to observe that in the State of Mississippi, the trial court is denied the right, by statute, to intruct the jury except as it may be requested in writing by one of the parties. Sec.

586, Mississippi Code of 1930. And the State Supreme Court has construed this statute in such a way as that if a trial judge orally instructs the jury, or gives an unrequested instruction, the statute is violated and the adverse party is entitled to a reversal.

Counsel tried this case with the lights before them, so far as this record reveals. They asked for no additional time and from the record it seems that further time was unnecessary, and were satisfied with the whole proceeding until after the Supreme Court affirmed the lower court's judgment. If a tactical mistake or blunder is sufficient to work a denial of due process of law, then the respondent submits that a premium is placed upon trickery, ignorance and inability, and instead of working toward perfection in the profession, the untrained and unskilled licensee would be the rule rather than the exception among the leaders at the bar. We do not believe that this Court will sanction any such rule, but it is our humble belief that this will result if what this record shows is sufficient to work a reversal of this conviction.

The judgment of the Supreme Court of Mississippi affirming the judgment of the Circuit Court of Kemper County, Mississippi, was entered on January 7, 1935. (R. 137). On January 15th, 1935, the appellants filed their motion with the Supreme Court praying for an additional fifteen days within which to file a Suggestion of Error, and this motion was sustained (R. 138). On February 5, 1935, there was filed in the Mississippi Supreme Court a document entitled "Motion in Arrest of Judgment and for

New Trial" (R. 141). Attached to this "Motion" was the ex parte affidavit of John A. Clark, of counsel for appellants in the trial court (R. 146 et seq. and the ex parte affidavits of the three appellants, Yank Ellington, (R. 149), Ed Brown (R. 153), and Henry Shields (R. 157).

The Mississippi Supreme Court, in passing on the Suggestion of Error, refers to this "Motion in Arrest of Judgment and For New Trial" in the following words (R. 172):

> "The appellants have filed what they designate as a motion in arrest of judgment, wherein they set forth matters said to have occurred on the trial which do not appear in the record. *A motion in arrest of judgment will not lie in the supreme court.* It reviews only the rulings of the court below complained of in an assignment of error, and in so doing is confined to an examination of the record made in the court below. It is not a court of original jurisdiction, but of appellate jurisdiction only, and therefore we cannot here examine or consider the allegations in the motion for arrest of judgment, nor the affidavits filed in support thereof."

This observation of the court is in strict conformity with the rules theretofore laid down by it. Not only will a motion in arrest of judgment not lie in the Supreme Court, but its purpose "is to search the record for errors made, not to make another and different record."

*State v. Joyner*, 148 Miss. 560, 114 So. 340.

The proper way to bring matters before the court which do not appear of record is by special bill of exceptions which is provided by statutes. This is distinctly provided by Sections 588, 589 and 590 of the Mississippi Code of 1930. These sections are discussed in a decision of the Mississippi court, and although at the time of the decision the 1930 code was not in existence, these statutes were brought forward without change from the former codes. The decision just referred to is that of *Fairley v. State*, 152 Miss. 656, 120 So. 747. In that case the court said:

> "The appellant also complains of certain language alleged to have been used by the district attorney in the closing argument to the jury, but this assignment is not properly presented by this record. The record discloses that counsel for the appellant tendered to the trial judge a special bill of exceptions embodying the alleged objectionable language, but the judge refused to sign this bill of exceptions. Counsel for appellant then made and filed an affidavit setting forth his version of the language and the incidents attempted to be incorporated in the special bill of exceptions, and this affidavit and the form of the bill of exceptions that was tendered the trial judge are sent up with the record of this cause.
>
> "Section 796, Code of 1906, (section 594, Hemingway's 1927 Code), provides that bills of

exceptions to any ruling of the court, made before the jury retires from the box, must be tendered and filed during the trial, or during the term of court; while section 798, Code of 1906 (section 600, Hemingway's 1927 Code), provides that, 'if the judge shall refuse to sign a bill of exceptions to an opinion, decision, or charge given or made on the trial of any cause or motion, when the bill of exceptions is tendered to him, it shall be lawful for two attorneys at law who may be present at the time of the giving or making of such opinion, decision, or charge, and of the refusal of the judge to sign such bill of exceptions, to sign the same; and the bill of exceptions so signed shall have the same force and effect as if it had been signed by the judge,' and it has been held that the latter statute provides the only remedy where the judge refuses to sign such a bill of exceptions. The purported special bill of exceptions, therefore, never became a part of the record, and we can only consider matters which are properly a part of the record before us. If, as stated by counsel for appellant, circumstances made it impossible to secure the signature of two attorneys to the bill of exceptions, we are unable to aid him, in the absence of statutory authority so to do."

And along same line and to the same effect, see:

*Pittman v. State*, 155 Miss. 745, 124 So. 761.

*Crane v. State*, 157 Miss. 548, 128 So. 529.

Included in the "Motion in Arrest of Judgment" was a motion for a new trial. Such motions lie only in the trial court, and must be made prior to adjournment. They do not lie in the Supreme Court.

*Pittman v. State*, 147 Miss., 593, 113 So. 348;
*Carter v. State*, 147 Miss. 171, 113 So. 177;
*Carraway v. State*, 167 Miss. 390, 148 So. 340.

The filing of this pretended "Motion in Arrest of Judgment and For New Trial" constitutes a palpable and deliberate, though abortive, attempt on the part of counsel to bring, by way of ex parte affidavits, the case within the decision of this court in *Powell v. Alabama*, 297 U. S. 45, supra. It has absolutely no place in Mississippi procedure. The Mississippi Supreme Court refused to consider it because it was not properly a part of the record of the trial, and since that court could not consider it, neither can this court, as expressly held in *Spies v. Illinois*, 123 U. S. 131, 181, where it was held:

> " . . As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more."

In conclusion upon this point, the State of Mississippi sumbits that since this alleged denial of counsel was not

specially set up or claimed in the court below, and the Mississippi Court refused to review this alleged Federal question for the reason that it was not set up or claimed in the trial court, this court can do no more than the State Supreme Court, and decline to review this matter. To give this court jurisdiction, the matter must have been specially set up and claimed in the trial court, and obviously, this has not been done.

## POINT III.

### THAT: PETITIONERS WERE DENIED DUE PROCESS OF LAW, IN THAT THE TRIAL COURT POSSESSED NO JURISDICTION TO ENTER JUDGMENT.

It is said that by reason of the fraud of state agents, (covered by Point I) and denial of counsel (covered by Point II), the state court was ousted of its jurisdiction and consequently could not enter a valid enforceable judgment.

In other words, did the use of "extorted" confessions and the appointment of counsel, under the circumstances reflected by the record, oust the court of its jurisdiction to enter judgment against these petitioners?

In *Felts v. Murphy*, 201 U. S. 123, the situation confronting the court was as follows: One who was almost totally deaf was tried, convicted and sentenced to life imprisonment in a state court on a charge of murder. On habeas corpus proceedings in a Federal District Court, the validity of the judgment was brought into question, it being insisted that, because of the failure of the trial court to see to it that the prisoner heard and understood the testi-

mony at the trial, the state court was ousted of its jurisdiction and, therefore, its judgment was void. Said the court, in addressing itself to this contention:

(129) "In this case the state court had jurisdiction both of the subject matter and of the person upon the trial of the accused, and such jurisdiction was not lost during his trial but continued to its end, and it had jurisdiction to direct the judgment which was entered and to have the same executed. If there were any irregularities in the trial of appellant, because of the failure of the court to see to it that the testimony in the case was repeated to him through the ear trumpet which he had with him, it was at most an error, which did not take away from the court its jurisdiction over the subject matter and over the person of the accused. The appellant was not deprived of his liberty without due process of law by the manner in which he was tried, so as to violate the provisions of the Fourteenth Amendment to the Federal Constitution. That Amendment, it has been said by this court, 'did not radically change the whole theory of the relations of the state and Federal Governments to each other and of both governments to the people'. In re Kemmler, 136 U. S. 436, 448; Brown v. New Jersey, 175 U. S. 172, 175.

"We are unable to see how jurisdiction was lost in this case by the manner of the trial. The

accused was compos mentis. No claim to the contrary is made. He knew he was being tried, on account of the killing of the deceased. He had counsel and understood the fact that he was on trial on the indictment mentioned, but did not hear the evidence. He made no objection, asked for nothing, and permitted his counsel to take his own course. We see no loss of jurisdiction in all this and no absence of due process of law. It is to be regretted that the testimony was not read or repeated to him. But that omission did not affect the jurisdiction of the court.

. . . and the most that can be urged is that there might have been an error committed by the trial court in omitting to have the evidence repeated to the appellant as it was given by the witnesses at the trial, even though no demand of the kind was made by petitioner or his counsel."

The case of *McMicking v. Shields*, 238 U. S. 99, involved an appeal from a judgment of the Supreme Court of the Philippine Islands, discharging appellee from custody on a judgment entered by the Court of First Instance, at Manila, on a charge of theft, on a writ of habeas corpus. The court stated the facts, in substance, set up in the petition. Among them, it appears that:

(102 "When the case was called at 10 A. M. on December 24th, and while the petitioner was arraigned, he asked for time in which to answer the complaint, which request was denied by the

court, who ordered the clerk to enter on the record that the petitioner pleaded 'Not Guilty' to the complaint. Thereupon the prisoner's attorney also asked for time in which to prepare a defense, which petition was also denied by the same court, to which ruling the petitioner's attorney excepted and asked that the exception, together with the requests of the petitioner which had been denied, be entered on the record."

The Supreme Court of the Philippine Islands held the judgment under which he was held void on the ground that by refusing the requests of him and his counsel, he was denied due process of law and the court was ousted of its jurisdiction to enter judgment against him.

This court, in addressing itself to the conclusion reached by the insular court, said:

"We are unable to agree with the conclusion of the Supreme Court that the judgment pronounced by the Court of First Instance was void and without effect. Under the circumstances disclosed, denial of the request for time to answer and to prepare defense was at most matter of error which did not vitiate the entire proceedings."

The case of *Frank v. Mangum* 237 U. S. 309 (334, 335, 336, 337) likewise holds that a denial of due process of law does not necessarily oust a trial court of its jurisdic-

tion, and that such a denial is an error subject to the corrective processes of the state courts.

In the *Matter of Moran*, 203 U. S. 96, it appears that Moran was tried and convicted in a United States District Court on a charge of murder. He petitioned for writ of habeas corpus and a writ of certiorari in this court. The case was heard on petition and answer. The various grounds upon which the petition was supported were alleged to go to the jurisdiction of the court. Said the court, after disposing of four other grounds:

> (105) "Finally, it is contended that the petitioner was compelled to be a witness against himself, contrary to the Fifth Amendment, because he was compelled to stand up and walk before the jury, and because, during a recess, the jury was stationed so as to observe his size and walk. If this was error, as to which we express no opinion, it did not go to the jurisdiction of the court. Felts v. Murphy, 201 U. S. 123."

Thus it will be seen that an infringement or denial of a constitutional right does not oust the court of its jurisdiction. It is at most a mere error, to be corrected by appeal.

Jurisdiction is the main element inquired into in habeas corpus proceedings. By referring to decisions of this court, it will be seen readily that a denial of due process does not oust a state court of its jurisdiction to enter an

enforceable judgment. As illustrating this proposition, see:

*Andrews v. Swartz*, 156 U. S. 272;

*Markuson v. Boucher*, 175 U. S. 184;

*Urquhart v. Brown*, 205 U. S. 179;

*Reid v. Jones*, 187 U. S. 153;

*Knewel v. Egan*, 268 U. S. 442.

If a trial court were ousted of its jurisdiction merely because some ruling might amount to a denial of due process, or a denial of some constitutional right, and its judgment consequently void, an accused could resort to habeas corpus to effect his release. However, it seems that the cases just cited hold that a denial of due process does not avoid a judgment of a trial court, so as to make its judgment reviewable by habeas corpus. Habeas corpus cannot be substituted for a direct review.

And now, while it is our contention that the matters discussed under Points I and II of this brief have not worked a denial of due process of law, nevertheless, if we should concede for the purpose of this argument that either one or both would work such denial, such denial would not have the effect of ousting the court of its jurisdiction to enter judgment in this case. And this is the conclusion pointed to by the decisions set out under this division of the brief.

Upon this proposition, petitioners cite and rely on *In Re Neilsen*, 131 U. S. 176. This case was mentioned by this court in its decision of *Felts v. Murphy*, 201 U. S. 123, 130, and the substance of that decision stated thus:

"The sentence imposed in that case was held by this court to have been beyond the jurisdiction of the trial court to pronounce, because it was against the express provisions of the Constitution, which bounds and limits all jurisdiction".

Obviously, this case can have no application to the point presented here. No complaint is made that the trial court or the supreme court of Mississippi had no jurisdiction either as to the person or as to the crime. The sentence imposed did not exceed the limits fixed by law, and no complaint is made on this ground. The only thing insisted is that there has been a denial of due process of law and consequent loss of jurisdiction; but, obviously, under the decisions of this court, jurisdiction can not be lost on such denial.

## POINT IV.

## THAT: PETITIONERS WERE DENIED DUE PROCESS OF LAW, IN THAT THEY WERE DENIED EQUAL PROTECTION OF THE LAW.

This assignment of error is based upon the theory that the petitioners were denied the right to make a motion for a new trial in the Circuit Court of Kemper County, Mississippi. In the brief of petitioners it is said that they filed a Motion for a New Trial and in Arrest of Judgment in the Supreme Court of Mississippi, on the theory that no opportunity had been afforded for filing same in the lower court. And they said, further: "Had the opportunity been afforded, and had counsel appointed by the court tak-

en advantage thereof, the technicality on which the Supreme Court relied in affirming the case, on original appeal, would *probably* have been swept away."

In *Duncan v. Missouri*, 152 U. S. 377, 382, it was said that equal protection of the law is afforded when

> ". . . the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of the government."

and in *Leeper v. Texas*, 139 U. S. 462, 468, this court said:

> ". . . that law in its regular course of administration through courts of justice is due process, and when secured by the law of the State the constitutional requirement is satisfied."

In *In Re Converse*, 137 U. S. 624, 631, it was said by this court:

> "We repeat, as has been so often said before, that the Fourteenth Amendment undoubtedly forbids any arbitrary deprivation of life, liberty, or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses, but it was not designed to interfere with the power of the State to protect the lives, liberty and property of its citizens; nor with the exercise of that power in the adjudica-

tions of the courts of a State in administering the process provided by the law of a State."

In *Allen v. Georgia*, 166 U. S. 138, 140, the court said:

". . . Without attempting to define exactly in what due process of law consists, it is sufficient to say that, if the Supreme Court of a State has acted in consonance with the constitutional laws of a State and its own procedure, it could only be in exceptional circumstances that this court would feel justified in saying that there had been a failure of due legal process."

In *Frank v. Mangum*, 237 U. S. 309, 326, it was said:

"As to the 'due process of law' that is required by the Fourteenth Amendment, it is perfectly well settled that a criminal prosecution in the courts of a state, based upon a law not in itself repugnant to the Federal Constitution, and conducted according to the settled course of judicial proceedings as established by the law of the state, so long as it includes notice, and a hearing, or an opportunity to be heard, before a court of competent jurisdiction, according to established modes of procedure, is 'due process' in the constitutional sense",—citing several cases supporting the rule.

So far as the "Motion in Arrest of Judgment and for New Trial" together with the affidavits attached thereto

are concerned, this court, as pointed out under Point II hereof, cannot consider such matters. No motion for a new trial was filed in the trial court, nor is there anything in the record to indicate that court adjourned even in the face of a request for time within which to file such a motion for new trial.

Under Mississippi procedure, a motion for new trial must be filed in the trial court. This is necessarily so because the Supreme Court is a court of review, while a motion for new trial, particularly the matters referred to in the "Motion in Arrest of Judgment and for New Trial", involve issues of fact where proof would be necessary. Under our procedure a motion is at issue without any formal pleading.

*Young v. State*, 150 Miss. 787, 117 So. 119;

*Reed v. State*, 143 Miss. 686, 109 So. 715.

And the averments of a motion are not proof thereof, and the burden is on the movant to establish them.

*Tatum v. State*, 171 Miss. 336, 157 So. 892.

In *Pittman v. State*, 147 Miss. 593, 113 So. 348, the Mississippi Court held, with reference to the action of a trial judge on a motion for new trial after the term at which a judgment was entered had expired:

> "When the term of court was finally adjourned, the appellant's right to file a motion for a new trial ended, and any action of the trial

judge in reference to such a motion, which was filed after the adjournment of the term, was of no effect, and is not properly a part of this record."

The court further said, in this same case:

"The verdict in this case was returned into court in the presence of able associate counsel for the appellant, and the record does not show that counsel requested any delay in order to enable them to present a motion for a new trial or in any way indicated to the court that they desired to present any such motion, and this being true, the appellant cannot now complain that the court adjourned the term when it had completed all business before it."

Along the same line is the case of *Carter v. State*, 147 Miss. 171, 113 So. 177, where the record did not show that any oral proof was offered to substantiate any of the grounds set up in the motion for new trial.

As part and parcel of this motion for new trial which was filed in the Mississippi Supreme Court was the motion in arrest of judgment, which, as herein before pointed out, will likewise not lie in that court.

In disposing of this "Motion in Arrest of Judgment and for New Trial" filed in the Supreme Court, these petitioners have been treated exactly the same as all others similarly situated, and in accordance with the well estab-

lished modes of procedure legislatively and judicially declared. And under the decisions of this court which are set out at the beginning of the discussion under this Point IV, the State of Mississippi submits that in so doing it has not denied to them the equal protection of the laws of the state, and that this court should now say, as it did in *In Re Converse*, 137 U. S. 624, 631:

> " . . . . Appellant has been subjected, as all persons within the State of Michigan are, to the law in its regular course of adminstration through courts of justice, and it is impossible to hold that a judgment so arrived at is such an unrestrained and arbitrary exercise of power as to be utterly void."

## POINT V.

## THAT: THE DECISION OF THE SUPREME COURT OF MISSISSIPPI IS, ITSELF, A DENIAL OF DUE PROCESS OF LAW.

Upon this point, the petitioners base their argument upon the proposition that the Mississippi Court, by holding that they had "waived" their right to object to these "extorted" confessions, denied them due process of law; and it is argued that they could not waive their "fundamental rights."

Before going any further into this discussion it is well enough to determine this question of "waiver". In the case of *Spies v. Illinois*, 123 U. S. 131, 181, it was said,

in connection with an argument on the use of a letter which it was claimed was illegally obtained and used in the prosecution:

> "Even if the court was wrong in saying that it did not appear that the Most letter was one of the papers illegally seized, it still remains uncontradicted that objection was not made in the trial court to its admission on that account. To give us jurisdiction under Sec. 709 of the Revised Statutes because of the denial by a State court of any title, right, privilege or immunity claimed under the Constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set up or claimed' at the proper time in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the Supreme Court of the State was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, and we can do no more. *This is not, as seems to be supposed by one of counsel for the petitioners, a question of a waiver of a right under the Constitution, laws or treaties of United States, but a question of claim.* If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive, so far as the right of review here is

concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence is not before us, and, therefore no foundation is laid under this objection for the exercise of our jurisdiction."

In other words, under the decision in the *Spies* case, supra, the "doctrine of waiver", referred to by counsel, has no application to the case at bar. It was not strictly a waiver, but *a failure to claim.* Under the Federal Constitution, one has the right to remain silent and refuse to testify if he so desires. If he goes upon the witness stand and does testify, however, he is not, under the decision referred to, said to have "waived" his right, but has merely failed to "claim" such right. Certain evidence may be said, as a matter of law, to be incompetent; the party against whom it is sought to be used has the privilege of objecting to it; but for one reason or another he has no objection to it, and fails to make objection to it. In this instance, the "doctrine of waiver" has no application to his decision, but it is a mere "failure to claim". And if he fails to "claim" his right to object to evidence, he has no right to allege in a court of review that the trial court erred in allowing such evidence to go to the jury. It seems to the writer that instead of the "doctrine of waiver" being involved, it is strictly the "doctrine of election", and one should be held to his election in a court of review. This is the rule in Mississippi, as pointed out in connection with the argument on Point I.

In disposing of this matter, the Mississippi Supreme Court has travelled the well established and clearly defined

pathway of appellate court procedure, and has invoked no unusual or arbitrary rule applicable to none others but these. Under the decisions of this court, from the beginning down to the present time, due process and equal protection of the law has been accorded them.

On this point, petitioners quote from *Hopt v. Utah*, 110 U. S. 574, 579. This case has been discussed in later decisions of this court, so that, while it held that a defendant could not "waive" his right to be present at his trial and every part of it, it has been expressly limited. For instance, in the case of *Frank v. Mangum*, 237 U. S. 309, this court said:

> ". . . In Hopt v. Utah, 110 U. S. 574, 578, (principally relied on), the court had under review a conviction in a territorial court after a trial subject to the local code of criminal procedure, which declared: If 'the indictment is for a felony, the defendant *must be* (italics by the court) personally present at the trial.' The judgment was reversed because of the action of the trial court in permitting certain challenges to jurors, based upon the ground of bias, to be tried out of the presence of the court, the defendant, and his counsel. The ground of the decision of this court was the violation of the plain mandate of the local statute; and the power of the accused or his counsel to dispense with the requirements as to his personal presence was denied on the ground that his life could not be lawfully taken

except in the mode prescribed by law. No other question was involved. See Diaz v. United States, 223 U. S. 442, 455, 458."

This limitation of the court of the Hopt case, supra, was recognized in the case of *Snyder v. Massachusetts*, 291 U. S. 97, 106, and approved.

Under this division of the brief for petitioners as well as under Point 1, this whole proceeding is assumed to be thoroughly impregnated and tainted with fraud, and they invoke the principle laid down in *Mooney v. Holohan*, (U. S.) 79 Law Ed. 347, to the effect that

> ". . . . if a state has contrived a conviction through the pretence of a trial which in truth is but used as a means of depriving a defendant of liberty through *a deliberate deception of court and jury by the presentation of testimony known to be perjured.*"

the requirement of due process of law, as provided by the Fourteenth Amendment, is not satisfied.

The Mississippi Court, in passing upon this contention (R. 170), said:

> "Mooney v. Holohan, L. ed. Adv. Opinion, Vol. 79, p. 347, is cited and relied on by the appellants but its relevancy here is not apparent. There the charge was that Mooney was convicted on perjury evidence, known to be such by the prosecuting officer, who suppressed evidence, un-

known to Mooney, in impeachment thereof. No charge either of perjury or the suppression of evidence is here made. On the contrary, all of the facts as to the confessions being coerced were known to the appellants when they were offered and were provable by their own personal testimony."

To assume that there was fraud in this case is to do violence to all the rules of law relating to "fraud". Since fraud vitiates everything it enters into, it is never assumed or presumed, but the showing of fraud must be clear and convincing. To presume fraud here, we would further have to presume that the prosecuting attorney was a party to a "deliberate deception of court and jury", and certainly there is nothing upon which this charge may be based.

This court judicially knows that where confessions are used in evidence at trials, there is hardly any exception to the rule that evidence to show the involuntary character of them is brought to the attention of the court. The books are in complete accord upon the proposition that the competency of confessions is a matter for the trial court to pass upon. And if a prosecuting attorney is to be faced with the dangerous necessity of offering only an air-tight voluntary confession or be guilty of consummating a legal fraud, then we say that the rule just stated, that the trial judge passes first upon the competency of confessions, has been thrown to the winds.

There is no hint of perjury in the record before this court. To the contrary these appellants admit that they

said just exactly what the state witnesses say they did. No testimony was concealed from them. They knew better than anyone else, perhaps, just exactly what did happen, and they admit that the true circumstances are before the court. We are not here dealing with three innocent men, but three guilty ones, as clearly appears from their own cross-examinations. Not only this, but on the very day of the trial, two of them voluntarily called the Sheriff of the County aside and told him that they had told him the truth when they were in the Lauderdale County jail. Where is there any fraud? any deliberate deception?

And in determining this question, let the Court keep in mind that force and intimidation was not resorted to to secure the confessions which were used at the trial. Counsel for petitioners leaves the impression in his brief that the confessions which were used were the direct result of beatings administered by those who testified with reference to the confessions, but the record does not bear him out on that ground. He further assumes that the wrongful influence used in obtaining the initial confessions still obtained when the later confessions were given. The petitioners' own testimony on cross-examination negatives any charge of force, threats, intimidation and the like, and not only shows that there was no abuse, ill-treatment or other form of coercion indulged in at that time, but on the other hand they say that they were kindly treated at this latter interview. Their only explanation is that they were "scared", and their version of the circumstances surrounding this latter interview with Sheriff Adcock shows that they were not "scared", but, that as they told the Sheriff

at the time of the trial, they told him the truth about what happened on the night of this brutal murder.

## CONCLUSION.

So far as the use of the confessions in this case is concerned, respondent says that there is no right, privilege or immunity guaranteed under the Federal Constitution against self-incrimination which is infringed by the use of extorted (assuming that these confessions were extorted) confessions in the trial of a criminal case in a state court. We have shown where the Mississippi Supreme Court has affirmed this conviction by following the well-established rules of procedure, and that no unusual or arbitrary procedure has been resorted to in so doing:

That, so far as the alleged denial of counsel is concerned, that matter has been settled by the decision of the Mississippi Supreme Court upon the ground that no complaint thereof was registered before or during the trial; that there was nothing to review; and consequently there is nothing for this court to review;

That the Circuit Court of Kemper County, Mississippi, had jurisdiction of both the person and the offense in this case and nothing it did or failed to do ousted it of its jurisdiction; and the Mississippi Supreme Court likewise was never ousted of its jurisdiction to enter a valid judgment;

That the case, from beginning to end, has been tried under the usual rules of procedure and practice, and, as said by the Mississippi Supreme Court (R. 172):

> "The rules of procedure here applied are technical only in the sense that all such rules are, and what the appellants request is simply that they be excepted from the procedure heretofore uniformly applied to all litigants."

That there has been no denial of due process of law within the meaning of that phrase as used in the Federal Constitution, and no denial or infringement of any other right guaranteed by that Constitution; and that an affirmance of this judgment would be proper under the previous pronouncements of this court.

Respectfully submitted,

GREEK L. RICE, Attorney General

WILLIAM DOW CONN, JR., and

WILLIAM H. MAYNARD, Assistant Attorneys General.

Counsel for Respondent.

## CERTIFICATE

I, William Dow Conn, Jr., Assistant Attorney General of the State of Mississippi, of counsel for respondent, hereby certify that I have this day served opposing counsel with copies of this brief.

This the ..... day of January, 1936.

.....

# APPENDIX

## MISSISSIPPI CONSTITUTION.

Sec. 26. In all criminal prosecutions the accused shall have a right to be heard by himself or counsel, or both, to demand the nature and cause of the accusation, to be confronted by the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and, in all prosecutions by indictment or information, a speedy and public trial by an impartial jury of the county where the offense was committed; and he shall not be compelled to give evidence against himself; but in prosecutions for rape, adultery, fornication, sodomy or the crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial.

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Sec. 146. The Supreme Court shall have such jurisdiction as properly belongs to a court of appeals.

## MISSISSIPPI STATUTES REFERRED TO IN BRIEF

Sections Taken from the Mississippi Code of 1930.

Sec. 588—On the trial of prosecutions for any crime or misdemeanor, it shall be the duty of the judge to sign any bill of exceptions tendered by the defendant during the progress thereof, if the truth of the case be fairly stated therein, and the said exceptions shall be a part of the record of such prosecution.

Sec. 589—Bills of exceptions to any ruling of the court, made before the jury retires from the box, must be tendered and signed during the trial, or during the term of the court, and bills of exceptions to judgments overruling motions for new trials must be presented to the judge for his signature during the term or within ten days, or such further time, not exceeding sixty days, as the court may allow, after the end of the term, and must be signed promptly by him if found to be correct; and if the death, resignation or other incapacity of the judge shall prevent him from signing a bill of exceptions, the affidavit of the attorney of record who represented the party tendering the bill of exceptions, and all of them if more than one, that it correctly states the facts and rulings of the court, shall be received as a substitute for the signature of the judge to it; but in such case, if the appellee shall file in the Supreme Court an affidavit of himself or his attorney in the court below, that the bill of exceptions is not correct, stating particularly wherein it is not correct, he may file any affidavits than his own touching the matter, and the opposite party may do likewise up to the time of the call of the case for trial in the Supreme Court; and said court shall consider and determine, on submission of the case, both as to the truth of the bill of exceptions and the questions involved in what the court may determine to be the bill of exceptions.

Sec. 590—If the judge shall refuse to sign a bill of exceptions to an opinion, decision, or change given or made on the trial of any cause or motion, when the bill of exceptions is tendered to him, it shall be lawful for two attorneys

at law who may be present at the time of the giving or making of such opinion, decision, or charge, and of the refusal of the judge to sign such bill of exceptions, to sign the same; and the bill of exceptions so signed shall have the same force and effect as if it had been signed by the judge.

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Sec. 586—INSTRUCTIONS.—The judge in any cause, civil or criminal, shall not sum up or comment on the testimony, or charge the jury as to the weight of evidence; but at the request of either party he shall instruct the jury upon the principles of law applicable to the case. All instructions asked by either party must be in writing, and all alterations or modifications of instructions given by the court or refused shall be in writing, and those given may be taken out by the jury on its retirement. The clerk, before they are read or given to the jury, shall mark all instructions asked by either party, or given by the court, as being "given" or "refused", as the case may be, and all instructions so marked shall be a part of the record, on appeal, without a bill of exceptions.

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Sec. 1293—Sentence upon Conviction—in capital cases, power of the jury.—In any case in which the penalty prescribed by law upon the conviction of the accused is death, except in cases otherwise provided, the jury finding a verdict of guilty may fix the punishment at imprisonment for the natural life of the party; and thereupon the court shall

sentence him accordingly; but if the jury shall not thus prescribe the punishment, the court shall sentence the party found guilty to suffer death, unless the jury by its verdict certify that it was unable to agree upon the punishment, in which case the court shall sentence the accused to imprisonment in the penitentiary for life.